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SUPREME COURT, U.S.

No. 81 6657

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, STATE OF GEORGIA

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QUESTIONS PRESENTED

I.

WHETHER THE REPEATEDLY IMPROPER ACTIONS OF THE PROSECUTOR SERIOUSLY PREJUDICED PETITIONER'S RIGHTS TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III.

WHETHER THE IMPOSITION OF THE DEATH PENALTY BASED UPON A FINDING OF THE (b)(2) STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT COMMITTED MURDER WHILE ENGAGED IN THE COMMISSION OF ANOTHER CAPITAL FELONY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE ADDITIONAL FELONY IS ARMED ROBBERY WHICH IS NOT NOW A CAPITAL OFFENSE. IN REVIEWING PETITIONER'S DEATH SENTENCE, THE GEORGIA SUPREME COURT DID NOT FULFILL THE FUNCTION MANDATED BY THIS COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976).

IV.

WHETHER THE DEATH SENTENCE AS IMPOSED BY THE JURY WAS IMPROPERLY RECEIVED BECAUSE THE (b)(2) AGGRAVATING CIRCUMSTANCE WAS INCORRECTLY STATED. THUS, PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

V.

WHETHER THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE §27-2534.1(b)(7), UPON WHICH PETITIONER'S SENTENCE IS PARTLY BASED, IS ON ITS FACE, APPLIED IN THE STATE OF GEORGIA, AND AS APPLIED IN THIS CASE, IMPERMISSIBLY VAGUE AND OVERBROAD IN VIOLATION OF THE RIGHTS PROTECTED BY THE GEORGIA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

VI.

WHETHER THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT MADE IMPROPER STATEMENTS TO THE JURY DURING THE TRIAL, THUS VIOLATING PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VII.

WHETHER PETITIONER'S DEATH SENTENCE SHOULD BE VACATED IN LIGHT OF STEPHENS V. ZANT, 631 F.2d 397 (5th Cir. 1980), (rehearing denied and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (October 5, 1981) (No. 81-89).

VIII.

WHETHER THE INFLICTION OF THE DEATH PENALTY ON A PERSON WHO WAS NINETEEN YEARS OF AGE AT THE TIME THAT THE ALLEGED CRIME WAS COMMITTED, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

IX.

WHETHER DURING THE PUNISHMENT PHASE OF THE TRIAL, THE TRIAL COURT FAILED TO CHARGE THE JURY ON THE LAW OF MITIGATING CIRCUMSTANCES, AND FAILED TO CHARGE THAT MITIGATING CIRCUMSTANCES COULD ACT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND, THUS, REQUIRE A SENTENCE OF LIFE IMPRISONMENT RATHER THAN DEATH. THIS ERROR VIOLATED PETITIONER'S RIGHT TO A RELIABLE, NON-ARBITRARY SENTENCING PROCEEDING, PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

DANIEL JOSEPH BAKER, :

Petititoner :

V. :

WALTER D. ZANT, :

Respondent :

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Butts County, Georgia in this capital case.

OPINIONS BELOW

The initial opinion of the Supreme Court of Georgia affirming the Petitioner's sentence of death is reported at 243 Ga. 710, 257 S.E.2d 192 and is reproduced as Appendix "A". The death sentence was vacated by this Court and the case was remanded to the Georgia Supreme Court for further consideration in the light of Godfrey v. Georgia. (Baker v. Georgia, 446 U.S. 961 (1980), Appendix "B") The Georgia Supreme Court subsequently reinstated the death sentence in an opinion reported at 246 Ga. 259, 272 S.E.2d 61 (1980), which is reproduced herein as Appendix "C".

On April 13, 1981, a Petition for Writ of Habeas Corpus was filed in the Superior Court of Butts County, State of Georgia. Petitioner's Writ of Habeas Corpus was denied by the Superior Court on October 14, 1981. (Appendix "D")

Thereafter, Petitioner's Application for Certificate of Probable Cause in the Supreme Court of the State of Georgia was denied on December 3, 1981. (Appendix "E")

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and herein the deprivation of rights secured by the Constitution of the United States. The Superior Court of Butts County, Georgia, denied Petitioner's habeas corpus petition in an order entered on October 14, 1981. (Appendix "D") The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on December 3, 1981. (Appendix "E")

On February 16, 1982, Mr. Justice Powell entered an Order extending the time for filing this Petition up to and including May 2, 1982. (Appendix "F")

This is a petition for a Writ of Certiorari to the Superior Court of Butts County, Georgia, from its denial of Petitioner's Writ of Habeas Corpus.

This Petition is being timely mailed pursuant to Rule 28.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any person...be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law...

Relevant provisions of the Georgia Code are set forth in Appendix "G" hereto.

FACTS

Petitioner, DANIEL JOSEPH BAKER, was indicted along with Ricky Lee Massey for the murder and armed robbery of Dennis Beatenbo. Petitioner, a youth of nineteen, and Massey, sixteen, were drinking and driving around town on the evening of May 5, 1978, when they picked up Beatenbo, who was hitchhiking. (Tr. 150) Beatenbo, who had been drinking heavily, was wearing a shirt bearing the letters "NORML"-the acronym for the National Organization for the Reform of Marijuana Laws. (Tr. 316)

The three drove to Beatenbo's parked car from which they obtained a bottle of liquor, and then drove around while drinking until they finally ended up on Pirkle Road in Gwinnett County, Georgia, near Norcross. Massey, the driver, began "cutting donuts", or making deep tire tracks, with the automobile, and Beatenbo became sick in the back seat of the car. (Tr. 150) He was vomiting and the car was stopped to enable him to get out. (Tr. 151) His illness was apparently attibutable to his extreme level of intoxication. The State stipulated that the ethyl alcohol content in the victim's blood was .39% (Tr. 107)--almost four times the blood alcohol level of .10% which constitutes legal intoxication. The criminal investigator for the office of the District Attorney (Tr. 109) testified:

> Q: What generally is the reading that you consider drunk?
>
> A: It's .10.
>
> Q: And if somebody had .39 alcohol, would that be considered very drunk.
>
> A: I think he would be unconscious.
>
> Q: He probably would be passed out would he not?
>
> A: Yes. (Tr. 159)

Petitioner got out of the car and struck Beatenbo in the face with the liquor bottle. In the opinion of the State's medical witness, Dr. Dove, Beatnebo was thereby rendered unconscious. (Tr. 96-103) While Beatenbo lay unconscious on the ground, Petitioner shot him three times in the chest. Beatenbo

died instantaneously, according to Dr. Dove. (Tr. 97) After he was dead, Petitioner fired a fourth shot into his body between the legs. (Tr. 98, 100-101) Petitioner then took the victim's wallet containing $22 and his wrist watch. (Tr. 151-152)

Petitioner testified during the sentencing phase of the trial that he did not kill the victim for the purpose of robbing him and did not have any intention of harming the victim prior to his sudden violent outburst. (Tr. 249, 251) Petitioner stated that he had no explanation of why he killed Beatenbo. Petitioner testified that he took the wallet and watch after the victim was dead in order to make the crime appear to be a robbery. (Tr. 257, 265) Petitioner stated that he knew what he did was wrong and that he asked God to forgive him for it. (Tr. 253)

BEFORE THE SUPERIOR COURT OF GWINNETT COUNTY

Petitioner was convicted of murder and armed robbery after a brief trial. Following the Georgia procedure, the same jury then sat to determine whether to recommend the death penalty. During this phase of the trial, Petitioner introduced evidence that, in the words of the Georgia Supreme Court, "depicted a rather harrowing history of child abuse" (p. , infra)[1/]

[1/] Petitioner is illegitimate. (Tr. 207) When he was four or five, his mother shot and wounded herself in his presence and said she would have killed him had she had another bullet. (Tr. 208) In the years Petitioner and his sister lived with their mother, there were beatings, mistreatment and an utter lack of affection. (Tr. 208, 237-238) When later they lived with their father, he tried to kill them. (Tr. 209) Relatives who briefly acted as step parents were no better. Petitioner was made to stay in a small, unlighted, windowless room for as long as a week at a time, even after a wild animal invaded it and had to be shot to save Petitioner's life. (Tr. 210-214) At age 8, Petitioner was adopted, but his adoptive father was an alcoholic who constantly beat and otherwise mistreated Petitioner, and was heard by Petitioner often to say that he had not wanted him. (Tr. 221-222, 242-243) After leaving the Marine Corps (which he joined as an alternative to being prosecuted on the complaint of his adoptive father in a dispute over the ownership of an automobile), Petitioner met a girl, fell in love and made plans to marry. (Tr. 245-248) That affair ended tragically. The girl was accidentally shot and killed. (Tr. 225, 248) Petitioner took to drink and was drinking heavily at the time of the Beatenbo murder a few months later. (Tr. 225, 248-249)

The State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) the murder was committed while the Petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman, in that it involved torture to the victim or depavity of mind on the part of the Petitioner. Petitioner moved to strike both of these statutory aggravating circumstances. Counsel argued that the first statutory aggravating circumstance must be struck, because armed robbery was not a capital felony, and that, accordingly, a jury recommendation of the death sentence could not constitutionally be based upon a finding that the murder was committed while the petitioner was engaged in committing an armed robbery. (Tr. 204-205)

Petitioner moved to strike the other, catchall aggravating circumstance on two grounds. Petitioner argued that the catchall aggravating circumstance in its broad and vague phrasing is unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution. Counsel asserted also that there was no evidence of torture within the meaning of the statute. (Tr. 203-205) He urged that, if the evidence adduced in the guilt or innocence phase of the trial was sufficient to support a finding of torture to the victim, then the death penalty would be appropriate for any murder, in violation of the teachings of Furman v. Georgia, 408 U.S. 238 (1972).

The trial court denied the motions to strike and submitted both statutory aggravating circumstances to the jury, but without any instruction that went beyond the statutory terms. (Tr. 303-302) The jury returned a recommendation of death, stating that: (1) "the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture to the victim or depravity of mind on the part of the defendant." and

(2) "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbo". (Tr. 309) Owing to the garbled finding of the section (b)(2) capital felony provision, the trial court inquired:

> THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the armed robbery?
>
> MR. FOREMAN: Yes sir.
>
> THE COURT: I believe I'm going to let you correct that so that it will include the entire language of the--I think you intended to do so but I believe you have omitted a sentence in it, you may do it there in your jury box if you see fit. (Tr. 309-310)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. The jury was not polled to insure that the entire panel accepted this unusual modification.

BEFORE THE GEORGIA SUPREME COURT

On appeal to the Georgia Supreme Court, it was argued again that neither statutory aggravating circumstance could constitutionally support the imposition of the death sentence. The Georgia Supreme Court sustained the Petitioner's sentence of death in the face of these arguments, but without seriously addressing them.

Under the sentence review heading of its opinion, the Court asserted that "The jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to

the victim", and it stated a conclusion that "the evidence supports the jury's finding..." (p.3a, infra; emphasis added) In fact, the question of whether there was an aggravated battery of the victim was not submitted to the jury and it made no finding that there was such a battery.

The Court also stated that the jury found that the murder was "committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery." (p.3a, infra) In fact to the extent that the jury made any intelligible finding at all on this point, its findings did not use the adjective "capital" in describing the felony of armed robbery. (p.40, infra) In response to the contention that it was unconstitutional to use armed robbery as "another capital felony" for purposes of the aggravating circumstance described in Ga. Code §27-2534.1(b)(2), the Court said merely that it had already been decided in Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), "that those crimes which were capital felonies in Georgia" when the Code section was enacted "continue to be capital felonies within the meaning" of the section. (p.2a, infra)

IN THIS COURT

In the October Term 1979, Petitioner sought review of the Georgia Supreme Court decision. (No. 79-5567) Petitioner attacked the constitutionality of both statutory aggravating circumstances as applied to his case and the Georgia Supreme Court's error of affirming the applicability of the section (b)(7) circumstance based on its mistaken notion that the jury had found the existence of an aggravated battery. Petitioner argued, as in Godfrey v. Georgia, 100 S.Ct. 1769 (1980), that the Georgia Supreme Court had adopted an unconstitutionally broad and vague interpretation of the catchall aggravating circumstance in affirming his death penalty. One week after this Court reversed Godfrey's death sentence, it vacated Petitioner's sentence of death and remanded his case to the Georgia Supreme Court for further consideration in the light of Godfrey.

THE ACTION BY THE GEORGIA SUPREME COURT ON REMAND

Following this Court's remand, Petitioner filed a timely Motion for Additional Briefing and Oral Argument, with an accompanying memorandum. The Georgia Supreme Court summarily denied Petitioner's motion.

On September 8, 1980, the Georgia Supreme Court reinstated Petitioner's death sentence (Appendix "C"). In its opinion, which reaffirmed the intitial sentence, it said that the decision in Godfrey was limited "to the specific factual circumstances present in that case". (p.6a, infra) The Georgia court restricted its consideration to distinguishing those specific circumstances from the facts in this case. The Court did not consider any of the mitigating factors that were present in this case, but not in Godfrey, nor did it mention any of the aggravating factors that were present in Godfrey but not in this case (e.g. that Godfrey killed two persons). The opinion wholly failed to address the need for jury instructions, setting forth a constitutionally acceptable interpretation of the section (b)(7) aggravating circumstance.

On December 8, 1980, Petitioner again filed a Petition for a Writ of Certiorari in this Court. The Petition was denied. Baker v. Georgia, 446 U.S. 961 (1980).

STATE HABEAS CORPUS PROCEEDINGS

On April 13, 1981, a Petition for a Writ of Habeas Corpus, for a stay of execution and for leave to proceed in forma pauperis were filed in the Superior Court of Butts County, State of Georgia. The Honorable Alex Crumbley ordered a stay of Petitioner's execution pending resolution of the within proceedings. On July 14, 1981, a hearing was held on Petitioner's Writ of Habeas Corpus.

Petitioner's Writ of Habeas Corpus was denied by the Superior Court on October 14, 1981. Notice of Appeal was timely

filed as was an Application for Certificate of Probable Cause in the Supreme Court of Georgia. The Application was denied by that Court on December 3, 1981.

REASONS FOR GRANTING THE WRIT

I.

THE REPEATEDLY IMPROPER ACTIONS OF THE PROSECUTOR SERIOUSLY PREJUDICED PETITIONER'S RIGHTS TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Among the improper actions of the prosecutor were the following:

(a) The prosecutor told the jury his personal opinion about the defendant's guilt or innocence.

(b) He implied that the jury did not hear all the evidence against the defendant. He suggested that other witnesses could have testified against the defendant.

(c) He introduced facts during his closing argument that were not part of the record and were not admissible. He intentionally misstated the evidence.

(d) He tried to impeach a defense witness by telling the jury what he knew about a disputed incident.

(e) He induced a government witness to make a prejudicial statement that both he and the witness knew the court had already ruled inadmissible.

(f) He offered his personal opinion about the existence of aggravating circumstances.

(g) He persuaded the jury to impose a death sentence by using inflammatory language and other arguments designed to make the jury sentence the defendant to death for reasons wholly extraneous to the crime.

This aspect of the case, as the Fifth Circuit noted in a similar situation, "presents nothing new--no new issue of law or unique factual configuration. It presents rather a situation far too common and too often condemned by this court to be in any manner excusable. We must deal again with the grossly improper prosecutorial comment during closing argument which substantially prejudiced defendant's right to a fair trial on the

evidence presented in his case." United States v. Garza, 608 F.2d 659, 661 (5th Cir. 1979) (emphasis added). In that case, as in the present action, the conduct of the prosecutor, even in the absence of a defense objection, so prejudiced the right to a fair trial that a new trial was required.

A. Opinion regarding guilt or innocence.

In his closing argument, the prosecutor asked the jury to enter a "guilty" verdict because his personal knowledge of the case lead him to believe that the defendant was guilty:

> I don't believe there is any question in this case, not only beyond a reasonable doubt, but beyond any doubt that this defendant committed the murder and armed robbery of Dennis Beatenbo. (Tr. 184-85) (Emphasis added)

The prosecutor's statement violates the most basic rule that counsel "is never justified in expressing the opinion ...that one whom he is pursuing is guilty. Such opinion is not legal evidence and in no circumstances, and at no step of the proceedings, is he entitled to thrust it into the case." Broznack v. State, 109 Ga. 514, 516 (1900).

It has been widely held that "a prosecutor is prohibited from injecting his own personal opinions in a case..." Brown v. Estelle, 468 F.Supp. 42, 46 (N.D. Tex. 1978), aff'd 591 F.2d 1207 (5th Cir. 1979). Such "comment has repeatedly been held to amount to reversible error". United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972), citing United States v. Brown, 451 F.2d 1231 (5th Cir. 1971); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966). In reaffirming this rule, the Fifth Circuit has relied, in part, upon standards of professional conduct. See e.g. Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Corona, 551 F.2d 1386 (5th Cir. 1977). The prosecutor's statement is a clear violation of the ABA Criminal Justice standard that "[i]t is unprofessional conduct for the prosecutor to

express his or her personal belief as to...the guilt of the defendant," ABA Criminal Justice Standards, The Prosecution Function, 3-5.8.[2/] It also transgresses the Disciplinary Rule of the Code of Professional Responsibility that "a lawyer shall not...assert his personal opinion...as to the guilt or innocence of the accused." Code of Professional Responsibility, DR 7-106(c)(4).

The rule that a prosecutor may not express an opinion about the defendant's guilt is also grounded in the Sixth Amendment right to counsel. For if the prosecutor is permitted to inject his opinion about the defendant's guilt:

> Where would this leave a criminal defendant who was entitled to representation, but whose counsel does not believe in his innocence? Must his counsel nevertheless assert such a belief in order to counter the expressed opinion of government counsel, or does such a defendant have an unrefuted witness against him, in the form of the prosecuting attorney? Or should a prosecutor be permitted to argue, for example, "Members of the jury, I tell you that in my opinion trained to examine evidence this defendant is guilty as hell. I know it. Even his own counsel knows it. Oh yes, his counsel asked you to find him not guilty, but I noticed that not once did he suggest to you that he had even a shadow of belief in his client's innocence. Why did he? Because his conscience wouldn't permit him to. Even his own lawyer doesn't think he is innocent, but he wants you***" etc. etc. That is not the argument made in this case, but we see no stopping point except the ones stated in the canon. Hall v. United States, 419 F.2d 582, 586 (5th Cir. 1969).

Such expressions are especially improper where, as here, the prosecutor implied that he had knowledge which was not presented to the jury. Id. at 586.

(b) Suggestion that jury did not hear all evidence.

After presenting the State's evidence, the prosecutor said to the jury, "Obviously I did not tell you everything..." (Tr. 181) He later suggested that he could have called more witnesses to prove the minute details about the crime that might raise some doubt, but that the additional evidence was not required:

[2/] The ABA points out that such expressions of personal belief "are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office..." Id. Commentary at 3-89.

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence. (Tr. 184)

During the crucial sentencing phase he implied that a defense witness lied, but that he did not have a rebuttal witness ready only because he was surprised by the testimony:

> I submit to you she could have gotten up here to see me if she had wanted to. But, you know, if--I don't know what they are going to testify to, I can't have witnesses here to rebut it. (Tr. 273)

The necessary implication of his comment is that if he knew the content of the testimony ahead of time, he could find a witness to discredit it.

The prosecutor may or may not have been able to call other witnesses. Even if the prosecutor could have called additional witnesses, his statement calls for the jury to trust and accept his assertion as if it were testimony. His comments violate the well established rule that a prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." United States v. Garza, supra, at 663. Specifically, the prosecutor may not imply that "he could have called additional witnesses whose testimony would have supported his version of the case." United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) citing Ginsburg v. United States, 257 F.2d 950, 954-55 (5th Cir. 1958); Nalls v. United States, 240 F.2d 707, 709-11 (5th Cir. 1957). In Ginsburg, supra, the prosecutor said that he "probably" could have found witnesses to refute defense character witnesses. The court held that even in the absence of an objection, the comment was plain and reversible error, because the comment "would have been magnified in its influence on the jury by an objection and motion for mistrial." Id. at 955.

(c) Introducing facts outside the record and misstating evidence.

The purpose of an attorney's "closing argument is to assist the jury in the analyzing, evaluating and applying the evidence." United States v. Garza, supra, 662. If an attorney makes comments which are not supported by evidence, "it is improper". Id. at 663. The ABA Criminal Justice Standards provide:

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. The Prosecutor Function, Section 3-5.9. Also see ABA Code of Professional Responsibility DR 7-106(c)(1).

The Fifth Circuit has therefore ruled that a prosecutor may not "state facts of his own knowledge, not in evidence and not part of the evidence to be presented or...make unwarranted inferences or insinuations calculated to prejudice the defendant." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

The prosecutor in this case repeatedly based his arguments favoring both conviction and the death sentence upon allegations not in evidence. Among the most egregious comments by the prosecutor were his frequent references to the good qualities of the victim and the victim's family. For example, during the sentencing phase, the prosecutor blurted out:

> What about Dennis Beatenbo? He's got a family, sisters and brothers and a mama and a daddy here. He worked in the construction work and, you know, he worked there for the last eight years. Tough life. Full of life. Enjoyed life. (Tr. 273)

The statements that the victim had a fine family and was a good worker are hardly relevant to the issue of whether a murder was committed under aggravating circumstances warranting the death penalty. More importantly, there was no evidence in the record to support the prosecutor's statement. He thereby used the closing argument to introduce evidence that would not be admissible at trial. Moreover, by drawing the jury's attention to

the presence of the victim's family, he clearly intended to make the jury impose a death sentence based upon factors which had no relevance to the crime involved. As a case cited by the Code of Professional Responsibility holds, such unsupported references to the qualities of the victim and his family are never proper:

> "The record in the case at bar was silent concerning the qualities and character of the deceased. It is especially improper, in addressing the jury in a murder case, for the prosecuting attorney to make reference to his knowledge of the good qualities of the deceased where there is no evidence in the record bearing upon his character... A prosecutor should never inject into his argument evidence not introduced at the trial." People v. Dukes, 12 Ill.2d 334, 341, 146 N.E.2d 14, 17-18 (1957). (Emphasis added)

The references to the presence of the victim's family is especially improper during the death sentencing argument, because Georgia law imposes the death penalty only under specific aggravating circumstances. The qualities of the victim or presence of the victim's family are not factors which may be considered by the jury.

The prosecutor made numerous other allegations which were not supported by evidence in the record. He alleged that the defendant killed the victim because he "wanted to see if [his gun] would kill a human being". (Tr. 183) And that the defendant was "proud" of the murder. (Tr. 183) These statements are opinions outside the record. He told the jury that to deter crime there was "no viable alternative" to the death penalty. (Tr. 272) An "inadequate" sentence (meaning in this case a sentence of life in jail) could not deter criminals "[no] matter how swiftly you catch them or how you punish them..." (Tr. 272) Certainly, no such evidence was presented at trial. Experts believe that such claims are highly controversial and the prosecutor improperly used his closing argument "to 'testify' as an 'expert witness'." United States v. Garza, supra, 662.

In attempting to refute the mitigating factors presented by the defense, the prosecution made reference to his family and

implicitly compared the way he was raised to the way defendant was raised. (Tr. 272, 276) Such comments are the basis for reversible error where, as here, "[r]eferences to the prosecutor's family was wholly outside the record [and] the defense attorney did not invite such argument." Brown v. Estelle, supra, 46.

The prosecutor convinced the jury to impose the death sentence by telling them that the defendant "has the capabilities of killing again without any remorse". (Tr. 277) No evidence supported this highly inflammatory assertion. The prosecution also persuaded the jury that the victim was tortured, in part, because the defendant "drag[ged] him over to the side of the road." (Tr. 276) Yet, there was no evidence that the victim had ever been dragged anywhere by anyone. Once again, the prosecutor's statement "was a bald assertion of a fact not in evidence and therefore improper." Hall v. United States, supra, 585.

(d) Injecting personal knowledge.

During the sentencing phase of the trial, the prosecutor used his cross-examination to tell the jury his personal knowledge about a disputed matter. A defense witness, Petitioner's adoptive mother, had mentioned in passing, the content of a telephone call she received from the prosecutor's office. The prosecutor then seized upon the remark to attempt to destroy the witness' credibility. He used cross-examination to tell his side of the story, hardly permitting a response from the witness:

> Q: And the truth is I tried to get in touch with some of your relatives because I knew that you were alone didn't I?
>
> A: Sir, I am--
>
> Q: Mrs. Baker, would you answer that question, please, ma'am?
>
> A: I--
>
> Q: Do you recall that I said you are alone?

A: After you found out I was upset, yes sir, you did.

Q: Mrs. Baker, isn't it really true I asked were you alone, was anybody close by?

A: Not until--

Q: I have some bad news to give you?

A: Not until you told me you did not, I thought it was some person--some penny, small thing. You said no, this is much worse, that is your very words. (Tr. 228)

The prosecutor thus told the jury that he was a fair, reasonable and sensitive man. He apparently suggested to the jury that such a considerate man would not request the death penalty unless it was necessary. During his closing argument, he criticized the woman for not speaking with him prior to trial:

> I submit to you she could have gotten up here to see me if she had wanted to. (Tr. 273)

These statements once again violate the well established rule that "[i]t is improper for counsel...to state facts of his own personal knowledge." Dunn v. United States, 307 F.2d 883, 885-6 (5th Cir. 1962). This rule is particularly important for the prosecutor, because he "has the advantage of official backing". Hall v. United States, supra, 536. Hence, his "assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1934).

(e) Eliciting objectionable testimony.

The prosecutor induced a government witness to express prejudicial opinion testimony after the court had ruled that the testimony should be excluded. This testimony concerned the highly controversial and inflammatory issue of the fourth shot, which was fired after the victim died and which the prosecutor improperly urged the jury to use as a basis for the finding of the (b)(7)aggravating circumstances. To determine if the defendant had an intent to torture, the jury had to determine the

intent or motive with which the last shot was fired. Before the state medical examiner testified, defendant's counsel, Mr. Pelham, objected to any testimony about the medical examiner's opinion regarding the intended purpose of the fourth shot. Defense counsel had advance warning that the prosecutor would elicit from the medical examiner his extraordinarily improper speculation about the defendant's intention in firing the post-mortem shot because this testimony had been improperly advanced in the previous trial of co-defendant Massey. (Tr. 92) Defense counsel made the objection in advance because "once he testifies or has testified, harm would be done." (Tr. 92) The court agreed, and excluded the testimony, saying that the jury must draw its own conclusions from the factual evidence. The prosecutor then signaled the witness that they should try to bring out this conclusion. Defense counsel reiterated his objection. The colloquy between the court and lawyers is as follows:

> [t]he jury was retired from the jury box.)
>
> THE COURT: State your motion.
>
> MR. PELHAM: Your Honor, I understand Dr. Dove is to be the next witness. From reading what he testified in another case having to do with the co-defendant, and reading his testimony in that case, there are certain things in there I anticipate in all probability he will probably testify to, and I would like at this time to interpose an objection before he does, because I think once he testifies or has testified, harm would be done. What I specifically refer to--
>
> THE COURT: I don't know what he is going to be asked or what--
>
> MR. PELHAM: Well, I read from the transcript the last--transcript of the last trial, page 32, the transcript he was asked about the--
>
> THE COURT: That is the trial of the co-defendant?
>
> MR. PELHAM: Yes, this is the trial of the co-defendant, this is what I am going to object to if he is going on--if he is going to testify to this. If he is not then--so be it. He was asked about the wound in the area between the man's legs, and he said well, there was a little hemorrhage around his wound. ["]My feeling certainly would

be we know this wound was not in an area meant to inflict death, it was only meant to inflict pain. My opinion would be this shot was probably fired after the others were fired and after the body quit moving, the shot was fired in an effort to determine whether or not there was still life in the body.["]

Your Honor, I would object to any statement.

THE COURT: I think that is objectionable. Dr. Dove can testify as to where the shot was.

MR. PELHAM: That's correct.

THE COURT: And the conclusion I believe would have to be--

MR. PELHAM: As to what the defendant's intent was, that is certainly objectionable, as to why he shot him.

THE COURT: I think the best thing to do would be to leave that out.

MR. HUFF: I think that if Your Honor please, it would be admissible, that he could state that type of wound was not the type of wound that would inflict death.

THE COURT: Certainly. I say he can testify to that part, no question about that.

MR. HUFF: But, Dr. Dove, you understand--

DR. DOVE: Yes.

MR. HUFF: Yes.

MR. PELHAM: I just--

MR. HUFF: So, we will try--

THE COURT: I think the jury would have to draw the conclusions, Dr. Dove.

MR. HUFF: We will try to bring it out.

MR. PELHAM: That was my objection. (Tr. 92-94) (Emphasis added)

The prosecutor then elicited the following response:

THE WITNESS: This of course was not an effort to kill the individual, it's not the type of wound that would kill him. (Tr. 99)

The prosecutor thus elicited the precise testimony that the court had ruled objectionable. The extremely prejudicial nature of this inflammatory speculation would contaminate the proceeding if it had been announced inadvertently. When the prosecutor

elicits such testimony in violation of a court order, reversal is clearly mandated.

(f) Opinion regarding aggravating circumstances and other matters.

The prosecutor did not limit his expressions of personal opinion to matters of guilt or innocence. He repeatedly offered his opinion about whether there were aggravating circumstances justifying the death sentence. He also offered his opinion about other matters which were to be decided by the jury.

He told the jury that he believed the last shot fired at the victim should fulfill the malice requirement. In describing the wound, he said, "Now if that doesn't indicate to me malice, ill feelings..." (Tr. 183). He offered his opinions on punishment by referring to life in jail as a "slap on the wrist" that "serves no useful purpose". (Tr. 272) He argued to the jurors, "...you know and I know in our human experiences that people in prison can and have the capabilities of killing again. There is no viable alternative for these type killers." (Tr. 272)

Regarding the mitigating evidence presented by the defense, he said, "and you know I almost thought that his adoptive father, Bill, was on trial today." (Tr. 273) Of the final gunshot wound, he said, "If that ain't depravity of the mind I don't know what is... And if you want to add insult to injury, I tell you what gets me, he took off and he went over to the Krystal and had a coke." (Tr. 274-275) Later he added, "If that ain't torture, then I don't understand the word torture." (Tr. 276) The prosecutor offered his personal analysis of the defendant's specific intent: "I tell you what was on his mind, getting whatever that guy had was what was on his mind." (Tr. 275) He told the jury that he didn't think the defendant was sorry about what he had done: "Remorse. The only remorse I have detected is that he got caught..." (Tr. 275) He told the jury that a murder involving robbery fulfilled the (b)7 requirements: "(i)f that type of killing isn't outrageously and wantonly vile

and wantonly inhuman, I don't know what is." (Tr. 276) Finally, he offered his opinion as a prosecutor that the defendant "has the capabilities of killing again without remorse." (Tr. 277)

All the above comments violated the previously discussed rule that "it is improper for counsel to express his personal opinion." Dunn v. United States, supra at 886. Because the prosecutor has an obligation of even-handedness and represents the government, "his power to persuade is great". Hall v. United States, supra at 588. His opinion that, for example, defendant had the capacity to kill again is a kind of "expert testimony" which the jury cannot lightly disregard. See e.g. United States v. Garza, supra at 662. The comment forces a juror to impose the death sentence or be responsible for a later killing that was predicted by the prosecutor.

(g) Inflammatory language and arguments.

The prosecutor labeled the defendant as "one mean man", (Tr. 280) and continuously used prejudicial terms, including "pumped him full of bullets" (Tr. 279) and "blowing him away". (Tr. 274) Use of such prejudicial language by a prosecutor has frequently created reversible error without regard to an objection of defense counsel. Steele v. United States, 222 F.2d 628, 631 (5th Cir. 1955) held that a prosecutor's characterization of the defendant as a "Dr. Jekyll and Mr. Hyde" was reversible error and that no objection from defense counsel was necessary. In Hall v. United States, supra, the prosecutor's description of the appellant as a "hoodlum" was one basis for reversible error because:

> [t]his type of shorthand characterization of an accused, not based on evidence is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of gray facts, it starkly rises--succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government. At 587.

Similarly, a prosecutor's description of a murder as an "assasination" is an "unnecessary appeal to passion and prejudice" and warranted reversal even though defense counsel did not object. United States v. DeLoach, 504 F.2d 185, 193 (D.C. Cir. 1974).

The prosecutor also made appeals for the jury to impose the death penalty based upon considerations wholly irrelevant to the crime involved. He asked the jurors to enter a verdict not upon their individual judgments, but to "render the conscious [sic] of this community." (Tr. 278) He asked for the death penalty to protect people in different circumstances from the threat of all potential killers:

> ...If the defendants know they go on and kill him and they are caught and tried they are going to get a death sentence, it will be like an invisible shield for all people who work alone in a convenience store or the young woman who was caught and abducted in a shopping center. It protects them because these people say wait a minute, if I just kidnap them or I just rob them and I don't kill them and I am caught, I will just get a prison sentence, but I know if I can go on and kill them and I am caught then I will face the electric chair. And it will raise that shield.
>
> We haven't had that shield in a great number of years and I submit to you that we need that shield to protect these innocent people out here. (Tr. 271-2)

The prosecutor's statement is very similar to other deterrence arguments resulting in reversible error. In Hanford v. United States, 249 F.2d 295, 298 (5th Cir. 1957), Judge Wisdom reversed a conviction for illegal possession of nontax-paid whiskey on the sole grounds that the prosecutor told the jury that he had "too many friends" and his friends' children get run over, up and down the highways "by drunk drivers". In Brown v. Estelle, supra, at 48, the prosecutor urged jurors to "voice your opinion in this community...that's why you're here today." The prosecutor told the jury "we have a crisis in this community with thieves...why don't they do something about it. The thieves are eating us up out there...I hope it's dawned on you that 'they' in the final analysis are you twelve people." The court ruled

that the comments were designed to impose a sentence upon the defendant based upon the need to control other thieves:

> Again these comments urge the jury to impose a sentence on petitioner not only for what he had done, but for what other thieves and criminals were doing. Again it was error and prejudicial to the defendant. Similarly, this prosecutor sought a death sentence against defendant not only for what he had done, but the acts of others who murdered lone workers in convenience stores or women in shopping centers. Brown, supra, at 48.

Most significantly, the prosecuting District Attorney, Bryan Huff, prepared an article entitled, "Death Sentence Cases", to be distributed to prosecuting attorneys throughout the state. This article was introduced in evidence at the July 14, 1981 hearing on the Petition for Writ of Habeas Corpus, as Petitioner's Exhibit No. 1. The treatise, a manual on how to obtain the death penalty, instructed the prosecutor to argue to the jury that capital punishment is a deterrent to like crimes. Huff, supra at 23, 26-28. This treatise is the best tangible proof of the prosecutor's true subjective feelings and intentions.

The California Supreme Court has repeatedly and emphatically held that this type of deterrent argument constitutes reversible error whether or not an objection is raised at trial. People v. Love, 56 Cal.2d 720, 366 P.2d 33 (1961); People v. Ketchel, 59 Cal.2d 503, 381 P.2d 394 (1963). The Supreme Court of Washington has also adopted this view. Hawkins v. Rhay, 78 Wash.2d 389, 400, 474 P.2d 557, 564 (1970). In Love, supra, during closing argument, the prosecutor urged the jury to impose the death penalty because such penalty would serve as a deterrert to others. The court held that such argument on the part of the prosecutor constituted prejudicial error:

> There is no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment. Since evidence on this question is inadmissible, argument thereon by prosecution

> or defense could serve no useful purpose, is apt to be misleading, and is therefore improper. 366 P.2d at 39.

Additionally, New York University law professor Stephen Gillers has recently argued that a deterrence argument at the sentencing stage is an uninformed guess and at odds with the need for individualization and the recognition of the finality of death. Such an argument violates the Eighth Amendment requirement of individualized sentencing in capital cases. Gillers, Deciding Who Dies, 129 U.Pa.L.Rev. 1, 53 (1980).

Professor Gillers aptly concluded:

> The finality of death ought separately to affect our tolerance for deterrence in capital cases. In non-capital cases, deterrence speculation will translate into length of imprisonment. A judge may add two years to a five year sentence because he or she believes the longer term will prevent other crimes. Imprisonment is measured with numbers. There are no comparatives in death sentencing. Death is infinite. It is not merely the highest number. We ought to hesitate before allowing execution to rest solely on a guess about its consequences, however differently we may strike the balance in non-capital matters. We ought also to keep in mind that in non-capital cases a guess can be revised--that is the term shortened--if new facts or new attitudes toward old facts, though not altering guilt, lessen our wish to set an example. Modification after execution is impossible. Id. at 53. (Emphasis added)

Finally, the prosecutor argued that the police had admirably done their duty. (Tr. 278) The Fifth Circuit has held that it is reversible error for a prosecutor to express his opinion that a police officer "was doing his duty to his country". United States v. Brown, 451 F.2d 1231, 1236 (5th Cir. 1971) The prosecutor implied that defense counsel represented Baker only out of a sense of "duty", rather than a belief in his innocence, (Tr. 278) and further suggested that he, personally, had somehow "insured" the rights of the defendant. (Tr. 277)

(h) Cumulatively, the prejudicial comments require reversal.

The cumulative weight of the prosecutor's comments were extremely prejudicial and require a reversal. Anything less

than reversal would be a clear message to prosecutors that courts will permit improper conduct in order to sentence a man to death. The Fifth Circuit "has passed too many times on this kind of comment by prosecutors to permit it to continue by allowing it to be brushed under the rug under the harmless error doctrine." United States v. Brown, supra at 1236. Even "the sufficiency of the evidence to establish guilt does not cure the conduct." Duggan Drug Stores, Inc. v. United States, 326 F.2d 835, 837 (5th Cir. 1964).

The failure of defense counsel to object to the improper conduct does not eliminate the need for a new trial. The Fifth Circuit has quite frequently reversed convictions where the prosecution committed error and defense counsel failed to object. United States v. Brown, supra; United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972); Steele v. United States, 222 F.2d 628 (5th Cir. 1955); United States v. Garza, supra; United States v. Corona, 551 F.2d 1386, 1391 n. 5 (5th Cir. 1977); Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969). Regardless of whether defense counsel should have objected, "at some point the transgressions of the prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them." United States v. Garza, supra, at 666.

The error cannot only be attributed to the prosecutor. For "[i]ndeed, the trial judge has an obligation in the interests of fairness and justice to stop the prosecutor from delivering a greatly prejudicial argument sua sponte." United States v. Corona, supra at 1391 n. 5, citing Viereck v. United States, 318 U.S. 236 (1943). The Georgia Court of Appeals in Howard v. Renfroe, 93 Ga. App. 59 (1955) citing Butler v. State, 142 Ga. 286 (1914), stated: "The gist of the error is that where rebuke is not made or cautionary instructions given, the improper argument goes with the apparent sanction of the Court." At 288. (Emphasis added) Petitioner here seeks reversal on the grounds

that the trial judge failed to cure the improper argument sua sponte, or failed to rebuke the prosecutor, and thus sanctioned the prosecutor's improper conduct.

The court cannot treat the error as harmless unless it was "harmless beyond a reasonable doubt". United States v. Hayward, 420 F.2d 142, 145 (5th Cir. 1969). In this instance, the jury had the discretion to recommend the death sentence after considering aggravating and mitigating circumstances. The improper arguments of the prosecutor certainly played an important role in their decision. Juries recognize that the interest of the prosecutor's office "in a criminal case is not that it shall win a case, but that justice shall be done". Berger v. United States, 295 U.S. 78, 88 (1934). The law requires that "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." Id. at 88. Juries therefore place great weight upon the prosecutor's opinion and assertions of knowledge:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should probably carry none. Id. at 88.

In this case, where a man's life is at stake, the repeatedly improper actions of the prosecutor can hardly be called "harmless error beyond a reasonable doubt". Where serious prosecutorial misconduct is involved, the Fifth Circuit has adopted the Supreme Court's proviso that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." United States v. Hayward, supra at 145, quoting Chapman v. California, 386 U.S. 23 (1967).

The harmless error doctrine is particularly inapposite in this death penalty case. The Supreme Court has observed that "the penalty of death is qualitatively different from a sentence of imprisonment, however long" and accordingly held that "there is a corresponding difference in the need for reliability in the determinative that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Furman v. Georgia, 408 U.S. 38 (1972); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976) (per curiam); Roberts v. Louisiana, 431 U.S. 633 (1977). The prosecutor's inflammatory assertions and objectionable tactics to obtain a death sentence based upon inappropriate considerations violated the Supreme Court's stern admonitions that decisions "to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349 (1977).

II.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Among the instances of ineffective assistance of trial counsel were the following:

(a) Trial counsel failed to move for a change of venue, although there was prejudicial pre-trial publicity against Petitioner in Gwinnett County.

(b) Trial counsel filed no challenge to the array of the grand or traverse jury pools in Gwinnett County, although they were subject to challenge for unconstitutional underrepresentation of older persons, Black persons, women and young persons.

(c) Trial counsel failed to conduct an adequate voir dire examination of prospective jurors.

(d) In many instances, trial counsel failed to object to testimony which would clearly have been ruled inadmissible had the objection been made.

(e) Trial counsel presented no evidence on Petitioner's behalf.

(f) Trial counsel's closing argument comprised only one and one-third pages of the trial transcript. On two occasions during his summation, trial counsel admitted his client's guilt. The following constituted the entire closing argument presented to the jury during the guilt-innocence phase of the trial:

> Ladies and gentlemen of the jury, I appreciate your attention, and I won't keep you long because this probably will be one of the shortest closing arguments I have made in a good while. As I explained to you at the outset of this trial, and as the court will charge you, the State must prove each and every allegation in the indictment beyond a reasonable doubt.
>
> The State has presented strong evidence in this case. The defense does not deny this death, does not deny he killed a man.
>
> There are a lot of things that are relevant in this case, but they are not relevant on this stage of the trial, as I explained to you earlier if and when you return a verdict

> of guilty, then when we begin the sentencing stage of the trial and present other evidence at that time and other argument, it will be your duty at that time to decide what punishment to give this man, whether to give him life imprisonment or sentence him to the electric chair.
>
> You have heard all the evidence. Realistically, in all probability, it won't be a real hard decision to make, and of course, I will get an opportunity at a later date to speak to you at great length and present other evidence.
>
> And I do appreciate your attention in this case and I thank you. (Tr. 185-186) (Emphasis added)

(g) During summation in the sentencing phase of the trial, trial counsel disclosed to the jury that he could not enter a guilty plea because the State would not agree to life imprisonment. (Tr. 281)

(h) Trial counsel failed to move the court for funds for experts necessary in the presentation of the defense and in the sentencing phase of the trial.

(i) Defense counsel failed to invoke the rule of sequestration of witnesses. (Tr. 62, 74, 75)

(j) Cumulatively, all acts and omissions of defense counsel as set forth herein, denied Petitioner effective assistance of counsel.

Since Powell v. Alabama, 287 U.S. 45 (1932), and Gideon v. Wainwright, 372 U.S. 335 (1963), it has been firmly established that a defendant charged with a serious crime in state court, has a constitutional right under the Sixth Amendment and due process clause of the Fourteenth Amendment to the assistance of counsel for his defense. This right rests not simply upon commencement of the criminal trial, but at the very outset of criminal proceedings. Powell, supra, 287 U.S. 45, 57. It is not fulfilled merely by the appointment of an attorney or the presence of an attorney at one's side: "Despite there being perhaps some salutary effect from the mere presence of a competent attorney available to a defendant in a criminal proceeding, physical presence alone fails to satisfy the mandate of the

Sixth Amendment." United States v. Woods, 487 F.2d 1219 (5th Cir. 1973). Rather, the Sixth Amendment guarantee is satisfied only when an accused is provided" effective counsel"--that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance" [emphasis in original]. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified on other grounds and affirmed en banc, 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877 (1961).

The guarantee of counsel "reasonably likely to render and rendering effective assistance" (the "MacKenna standard") has been reaffirmed so consistently and so many times that it has become the idiomatic formulation of the Sixth Amendment standard. See, e.g., Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980); Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir. 1974) cert. denied, 422 U.S. 1011 (1975); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974).

The distinction between retained and court-appointed counsel as to the degree of protection due the criminal defendant was abolished by this Court in Cuyler v. Sullivan, 446 U.S. 335 , 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The Cuyler court stated:

> A proper respect for the Sixth Amendment disarms Petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. ...Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. (Emphasis added)

Whenever a person has been convicted of a capital offense, the conduct of his counsel must be strictly scrutinized. Smotherman v. Beto, 276 F.Supp. 579, 586 (N.D. Tex. 1967). This is necessitated by the understanding, expressed by this Court in Gardner v. Florida, 430 U.S. 349 (1977), that death differs from other forms of punishment:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reasons rather than caprice or emotion. 430 U.S. 349, 357-358.

Effective assistance of counsel in a capital case must be assessed with respect to two proceedings which together comprise the defendant's "trial". In the wake of Furman v. Georgia, 408 U.S. 238 (1972), death penalty statutes in Georgia and other states were modified in order to fashion a proceeding that was intended to provide statutorily guided discretion in capital sentencing. Ga. Code Ann. §26-3102.

For assistance of counsel to be effective in a capital case, it must be demonstrably effective in both the guilt/innocence phase of the trial and the sentencing phase of the trial.

This Court has stated repeatedly that the pre-trial phase of a criminal defense is "perhaps the most critical period of the proceedings," a time when "consultation, thorough-going investigation and preparation [are] vitally important." Powell v. Alabama, 287 U.S. at 57; accord, e.g., Von Moltke v. Gillies, 332 U.S. 708, 721-23 (1948). The rationale for this assertion is fundamental: "[a]ny experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all." Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967). The state failed to offer any testimony at the hearing on the petition for writ of habeas corpus that trial counsel prepared the case for trial or took an active posture in defending the case. "The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance," 432 F.2d at 739 (footnote omitted), for any "intelligent and knowledgeable

defense...requires investigation and preparation." Caraway v. Beto, 421 F.2d at 637-38. Trial counsel, Wynn Pelham, testified at the July 14, 1981 hearing on the petition for writ of habeas corpus that he received no money for expenses; he told the family that they could qualify to have counsel appointed; he never discussed the employment of experts with the family nor with Petitioner himself. He further testified that if the family had the funds, he would have employed experts. Moreover, he never interviewed the state's witnesses because he was never contesting Petitioner's guilt.

The Fifth Circuit has consistently and repeatedly held that no attorney can provide "effective assistance" if he fails "to conduct a 'prompt investigation of the circumstances of the case and explore all avenues leading to facts relative to guilt and degree of guilt or penalty.'" Davis v. Alabama, 596 F.2d at 1217 [quoting ABA Standards Relating to the Prosecution Function and the Defense Function Section 4.1 (Tent. Draft 1979)].

Trial counsel did not put Petitioner on the stand and presented no defense at the guilt innocence phase of the trial. Clearly, given the complete absence of any defense witnesses or evidence at trial, the question of whether or not to put Petitioner on the stand was critical to his defense. Bell v. Georgia, 554 F.2d 1360 (5th Cir. 1977). "Informed evaluation of potential defenses to criminal charges" is a "cornerstone of effective assistance of counsel" and "trial counsel's failure to conduct an investigation adequate for the performance of th[is] function[] deprive[s] [the accused] of constitutionally effective assistance of counsel." Gaines v. Hopper, 575 F.2d at 1149-50. Accordingly, the courts have reversed numerous convictions for counsel's failure to fully pursue potential defenses. E.g., Davis v. Alabama, 596 F.2d at 1217-19; Bell v. Georgia, 554 F.2d at 104; United States v. Edwards, 488 F.2d at 1164-65; Roberts v. Dutton, 368 F.2d at 473-74; MacKenna v. Ellis, 280 F.2d at 601. Reversal has been mandated even when the

defense appeared to have no chance of success. See, Gaines v. Hopper, supra, at 1149-50; Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972); Mendenhall v. Hopper, 453 F.Supp. 977, 986-87 (S.D. Ga. 1978), aff'd 591 F.2d 1342 (5th Cir. 1979), and even when, after interviews with his client, counsel was not aware that a foundation for the defense existed. See, Smotherman v. Beto, 276 F.Supp. at 583, 588.

The facts of this case demonstrate that Petitioner was denied effective assistance of counsel at the very strategic pre-trial level. At the hearing on the Petition for Writ of Habeas Corpus, Rev. Harold Turner[3/] testified that trial counsel confided in him that he did not feel he was qualified to try the Baker case.

(b) Failure to file necessary pre-trial motions.

(1) In the present case a jury composition challenge of the traverse and grand jury pools should have been made.

(2) Trial counsel should have filed a motion to change venue in light of the substantial adverse publicity that Petitioner's case had received.

Trial counsel testified that he filed neither pre-trial motion.

(c) Ineffective assistance of counsel during trial.

The many defaults and errors committed during Petitioner's trial, taken together, clearly deprived Petitioner of his right to reasonably effective assistance of counsel guaranteed by the Georgia Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

The record reflects that trial counsel, at best, conducted only a cursory voir dire of potential jurors. Moreover, at no time did he request that the prospective jurors be questioned individually and outside the presence of the entire panel, concerning extremely sensitive questions about their views on capital punishment and whether they could be fair and impartial jurors given the emotional facts of the case.

[3/] Rev. Turner is the Missionary Minister of the Doraville Church of God, Doraville, Georgia, who has been counselling Danny Baker weekly since November of 1978 and has had a positive impact on his life.

During the trial itself, counsel put on no witnesses nor evidence on Petitioner's behalf, not even the testimony of Petitioner himself. Defense counsel neither interviewed the state's witnesses nor conducted an adequate cross-examination (going to the relevant issues involved) of the prosecution's witnesses. Even at the sentencing phase of the trial, the Fifth Circuit Court of Appeals has held in Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980) that:

> Effective assistance at this [sentencing] stage, as at other stages requires zealous and not merely perfunctory or pro forma representation...We are faced with a situation where the defense attorneys 'put on what amounts to no defense at all'...we unhesitatingly believe that this lack of defense, at such a critical stage, due to ineffectiveness of counsel, resulted in great prejudice to Petitioner. As the Fifth Circuit has noted, court-appointed counsel 'cannot stand still and do nothing. That indeed might be the best evidence of incompetence, or infidelity, or ineffectiveness, or all three'. Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965) (Emphasis added)

(d) Ineffective assistance of counsel post-trial.

While defense counsel did file a Motion for New Trial, he did not include as one of the grounds for the motion, ineffective assistance of counsel. A Motion for New Trial is held to be the only post-trial vehicle available for raising a claim of ineffective assistance of counsel in the trial court. Brown v. State, 150 Ga. 585 (1920).

In the instant case, the omissions and errors of trial counsel as set forth above, denied Petitioner effective assistance of counsel as guaranteed by the Sixth Amendment.

III.

THE IMPOSITION OF THE DEATH PENALTY BASED UPON A FINDING OF THE (b)(2) STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT COMMITTED MURDER WHILE ENGAGED IN THE COMMISSION OF ANOTHER CAPITAL FELONY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE ADDITIONAL FELONY IS ARMED ROBBERY WHICH IS NOT NOW A CAPITAL OFFENSE. IN REVIEWING PETITIONER'S DEATH SENTENCE, THE GEORGIA SUPREME COURT DID NOT FULFILL THE FUNCTION MANDATED BY THIS COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976).

The Georgia Supreme Court's determination that Petitioner committed the crime of murder while he was "engaged in the commission of another capital felony" violates both the Eighth and Fourteenth Amendments because armed robbery is not a "capital felony".

In Coker v. Georgia, 433 U.S. 584 (1977), this Court held that the sentence of death for the crime of rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment. The judgment imposing the death sentence in that case was reversed and the case was remanded. The Supreme Court in Gregg v. State, 233 Ga. 117 (1974) held that armed robbery alone does not warrant the death penalty.

The rationale of Coker and Gregg was applied to armed robbery and kidnapping in Collins v. State, 239 Ga. 400 (1977). The Supreme Court of Georgia held that the death penalty may not be imposed for the crimes of armed robbery and kidnapping:

> It follows that there can be no 'conviction of a capital felony' for these crimes within the meaning of the constitutional provision establishing the jurisdiction of the Supreme Court. In our view the expression capital felony when used in our law, is merely descriptive of those felonies to which the death penalty is affixed as a punishment under given circumstances to distinguish such felonies from that class in which under no circumstances would death ever be inflicted as a penalty for the violation of the same...We conclude that convictions of rape, kidnapping and armed robbery under present Georgia statutes are no longer 'convictions of capital felonies' for appellate jurisdictional purposes and jurisdiction of these appeals lies in the Court of Appeals. at 236 S.E. 761. (Emphasis added)

The Court then stated that "on and after August 1, 1977, rape, armed robbery and kidnapping cases shall be docketed in the Court of Appeals," whereas appellate jurisdiction of capital cases rests in the Georgia Supreme Court.

In Peak v. State, 239 Ga. 422 (1977), the Georgia Supreme Court again reiterated the holding in Coker and Collins, that the death penalty may no longer be imposed for crimes of rape, armed robbery and kidnapping. The Court held that the death sentence received for the crime of kidnapping with bodily injury to the victim must be set aside and remanded to the trial court with direction that appellant be resentenced to life imprisonment, the only permissible punishment remaining under the kidnapping statute.

Since Gregg, the Georgia Supreme Court has continued to disapprove the death penalty for armed robbery. However, the Court has continued to recognize armed robbery as a capital offense for the purpose of applying the aggravating circumstance provision of Ga. Code §27-2534.1(b)(2).

A capital felony by definition is a crime for which one can receive a sentence of death. See Ga. Code §26-3102, which defines a capital offense as "an offense which may be punishable by death." The definition of a "capital felony" has been settled in Georgia, if not everywhere else for decades:

> If under any circumstances the penalty of death can be inflicted, the offense is capital, whether it is actually inflicted in a particular case or not. If under no circumstances the death penalty can be inflicted, the offense is not capital. Casear v. State, 127 Ga. 710 (1907)

Accordingly, armed robbery is not a capital felony in the State of Georgia.

Before a convicted defendant may be sentenced to death under the Georgia Death Penalty Statute, the jury must find beyond a reasonable doubt, one of the ten aggravating circumstances specified in the statute. Gregg v. Georgia, 428 U.S

153 (1976). It is axiomatic that the jury must find every element of the offense beyond a reasonable doubt before any criminal sanction can be constitutionally imposed. Therefore, it follows that a jury must find every element of at least one aggravating circumstance beyond a reasonable doubt before a defendant can be sentenced to death. Thus, Petitioner's death sentence cannot rest upon the additional capital felony statutory aggravating circumstance. One element of the offense cannot be proved beyond a reasonable doubt because even if an armed robbery were proved conclusively,[4/] it would not amount to the statutory offense of "an additional capital felony".

The Supreme Court of Georgia has nevertheless taken the view that for purposes of the death penalty statutes, the term "capital felony" includes those felonies such as armed robbery, that the statutes as originally enacted specified as being subject to punishment by death. The Supreme Court of Georgia has maintained that the simple fact that an armed robbery is not a capital felony should not prevent it from holding that an armed robbery is a capital felony for purposes of aggravation. This Lewis Carroll approach to the construction of the State's criminal code exceeds the limits of the due process code.

The branding of armed robbery as something it is not, violates Petitioner's due process rights for an additional reason. The jury may have been led to believe incorrectly that, if Petitioner had committed an armed robbery, he had committed a crime for which he could be punished by death. A jury's belief that a defendant has committed two crimes for which he could be sentenced to death--two capital felonies--inhances the possibility that such a defendant will receive the death sentence for the single capital felony with which he is charged. If a jury's sentencing deliberations are based on the erreonous view

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[4/] Petitioner, however, has consistently contended that no armed robbery was committed.

that a defendant has committed two capital felonies, the defendant is denied a fair sentencing trial.

IV.

THE DEATH SENTENCE AS IMPOSED BY THE JURY WAS IMPROPERLY RECEIVED BECAUSE THE (b)2 AGGRAVATING CIRCUMSTANCE WAS INCORRECTLY STATED. THUS, PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

Georgia Code §26-3102 specifies that "a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed". Therefore, before a convicted defendant may be sentenced to death under the Georgia Death Penalty Statute, the jury must find beyond a reasonable doubt one of the ten aggravating circumstances specified in the statute. Gregg v. Georgia, 428 U.S. 153 (1976). It is axiomatic that the jury must find every element of the offense beyond a reasonable doubt before any criminal sanction can be constitutionally imposed. Therefore, it follows that a jury must find every element of at least one aggravating circumstance beyond a reasonable doubt before a defendant can be sentenced to death.

In the instant case, the State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) that the murder was committed while the petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman, in that it involved torture to the victim or depravity of mind on the part of the petitioner. With regard to the aggravating circumstance involving armed robbery, the jury actually returned a writing that read: "The offense of murder was committed while the offender to incident the armed robbery of Denris Beatenbo." (Tr. 309) The trial court then inquired:

> THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing "the offense of murder was committed while the offender was engaged in the commission of an additional felony, to wit: the armed robbery?"

MR. FOREMAN: Yes sir.

THE COURT: I believe I am going to let you correct that so that it will include the entire language of the--I think you intended to do so, but I believe you have omitted a sentence in it. You may do it there in your jury box if you see fit. (Tr. 309-310)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. Most significantly, even the amendment as suggested by the judge failed to conform to the requisite language of the statute because the word "capital" was omitted. Thereafter, the jury was not polled to insure that the entire panel accepted this unusual modification.

The jury's partial recitation of Section (b)(2) did not constitute a suitable finding of statutory aggravating circumstance as mandated by Georgia Code Ann. §26-3102. In his charge, the trial court instructed the jury that if they wished to impose the death penalty, they must record their precise findings as to aggravating circumstance on a furnished form. (Pursuant to Ga. Code Ann. §27-2434.1(c)) Obviously, the jury violated this command. The (b)(2) statement that the foreman returned could hardly constitute "the aggravating circumstance or circumstances which it found beyond a reasonable doubt." Ga. Code Ann. §27-2534.1(c). The jury's confused finding remains a matter of conjecture as to what was actually intended.

It is a well established proposition that ambiguity in a criminal verdict cannot be reconciled unfavorably to the defendant. Simcox v. United States, 571 F.2d 876 (1978); Glenn v. United States, 420 F.2d 1323 (D.C. Cir. 1969). These considerations particularly apply in a death case where the defendant's life rests in the balance. The Georgia Legislature was not content to allow juries to impose a sentence of death by general verdict, but instead has adopted the requirement that "the jury, if its verdict be a recommendation of death, shall

designate in writing...the aggravating circumstance or circumstances which it found beyond a reasonable doubt" Ga. Code Ann. §27-2534.1(c) (1978). Presumably, this additional requirement that the jury specify at least one aggravating circumstance in its own writing was enacted to insure greater reliability in the fact finding and appellate decisions. This safeguard for the defendant is weakened, however, if the State is simply allowed to fill in the gaps in the jury's findings as was done in the instant case, when the court suggested to the foreman that his intent was "the offense of murder was committed while the offender was enaged in the commission of an additional felony, to wit: the armed robbery." (Tr. 309-310)

It is particularly significant that the court instructed only the jury foreman and not the entire jury as to how to amend the (b)(2) finding. The foreman, acting alone, accepted the suggested amendation without any further action by the jury as a whole. The jury was not thereafter told to determine whether in fact the (b)(2) finding as amended, constituted their verdict. Such action denied Baker the right of trial by jury that is mandated by Georgia law in capital cases.

The imposition of the death sentence in the face of the incomplete jury finding of the Section (b)(2) aggravating circumstance failed, in violation of the Eighth Amendment, to insure scrupulously the reliability of the decision to impose the death sentence and undermines Baker's right to have every element of his offense proved beyond a reasonable doubt. In addition, the incomplete (b)(2) finding flouts the State's own procedural rule that capital defendants will be sentenced to death only if all the necessary elements of at least one statutory aggravating circumstance have been specifically found by the jury. As the Supreme Court's recent decision in Hicks v. Oklahoma, 100 S.Ct. 227, 229 (1980) confirms, a Georgia defendant has "a substantial and legitimate expectation" that he

will be deprived of his life only if the state procedural rule is satisfied. This arbitrary disregard of the State's own procedural rule in itself constitutes a denial of due process. Accordingly, the imposition of a death sentence on Baker, based only on a partial and incomplete finding of the Section (b)(2) aggravating circumstance, violated his Fifth Amendment right to due process of law and also constituted a violation of the Eighth and Fourteenth Amendments.

V.

THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE §27-2534.1(b)(7), UPON WHICH PETITIONER'S SENTENCE IS PARTLY BASED, IS ON ITS FACE, APPLIED IN THE STATE OF GEORGIA, AND AS APPLIED IN THIS CASE, IMPERMISSIBLY VAGUE AND OVERBROAD IN VIOLATION OF THE RIGHTS PROTECTED BY THE GEORGIA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's sentence of death was imposed by the trial court based in part upon a finding by the jury of the aggravating circumstance defined in Ga. Code §27-2534.1(b)(7), which provides inter alia:

> The offense of murder...was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This Court has long recognized that the imposition of the death penalty may not be done in a capricious or arbitrary manner, arising out of passion or prejudice; for to do so is violative of the Eighth and Fourteenth Amendments to the United States Constitution. Furman v. Georgia, 409 U.S. 241 (1972).

The Court in Godfrey v. Georgia, 446 U.S. 420 (1980), set forth two criteria that must be met if the Georgia courts wish to impose a death sentence based upon a finding of the aggravating circumstance under Ga. Code 7-2534.1(b)(7). The first criteria involves the trial court's instructions to the jury. Since the language of Section (b)(7) fails to imply "...any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court is required to impose a narrowing construction of Section (b)(7) in its jury charge. The trial court has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" to the jury. Godfrey v. Georgia, supra at 1764-65.

(a) The absence of any jury instructions that channelled the sentencer's discretion by "clear and objective standards"

renders Petitioner's death sentence based on a finding of Section (b)(7) constitutionally defective under the Eighth and Fourteenth Amendments to the United States Constitution.

As this Court previously recognized in reviewing Georgia's death penalty statute, it would be "virtually unthinkable" for a jury to decide whether a person should live or die without "careful instructions on the law and how to apply it". Gregg v. Georgia, 428 U.S 153, 193 (1976).

In instructing the jury, the trial court should ensure that the evidence that the offense was "outrageously and wantonly vile, horrible and inhuman" demonstrates "torture, depravity of mind, or an aggravated battery to the victim". Godfrey v. Georgia, supra at 1776. As in Godfrey, these standards were not used in the present case to delimit Section (b)(7) to the jury. The jury instructions consisted of the trial judge merely rereading the words of Section (b)(7) to the jury, giving no explanation or definition of the Section (b)(7) aggravating circumstance. Repeating the language of Section (b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, Godfrey v. Georgia, supra at 1765, and when no further guidance is given to the jury, its interpretation of Section (b)(7) "...can only be the subject of sheer speculation". Id. at 1765. The trial court left the jury to its own devices with no guidance on the Section (b)(7) circumstance issue. Quite obviously, the type of reasoned and channelled discretion envisioned in Furman v. Georgia, supra, cannot be obtained through the jury instructions and jury verdict found in this case.

(b) Because of the likelihood that the jury's finding of Section (b)(7) was based on the inappropriate consideration of post-mortem abuse of the victim, the Georgia Supreme Court's reinstatement of Petitioner's death sentence violated the Eighth and Fourteenth Amendments.

The evidence presented at Petitioner's trial was insufficient as a matter of law to prove beyond a reasonable doubt the requisite serious physical abuse of the victim prior to death and, therefore, cannot support the Section (b)(7) circumstance.

The preceding section noted that the jury that imposed the sentence of death on the Petitioner was given no guidance concerning the meaning of the catchall aggravating circumstance. This error of omission was exacerbated by the state's attempt to secure a finding of torture based on the inappropriate consideration of post-mortem conduct in violation of the state's own articulated standards.

The decision in Godfrey noted that, under the Georgia Supreme Court's own "Harris-Blake" standards interpreting Section (b)(7), the existence of torture could not be proved by evidence relating to acts after the victim was dead. Godfrey, 100 S.Ct. at 1776. On remand in this case, the Georgia high court declared: "Godfrey v. Georgia established that torture occurs when the victim is subject to serious physical abuse before death." The uncontradicted testimony of the state's own medical witness revealed that the fourth shot was fired into the victim after his death. Therefore, this shot could not be considered as evidence of torture. Nonetheless, the prosecutor attempted to establish and then vehemently argued to the jury, that the post-mortem shot constituted torture upon which the jury could base a finding of the catchall aggravating circumstance.[5/]

Apparently, the trial judge was misled by the prosecutor's attempt to secure a death sentence based on this inappropriate consideration. In his trial report, the trial judge indicated that the victim had been "physically harmed or tortured" and

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[5/] In his closing argument the prosecutor alluded to Petitioner's shooting the victim "in the privates" and commented: "If that ain't torture, then I don't understand the word torture". (Tr. 276) While the prosecutor tried to inflame the passions and prejudices of the jury by referring to the shot between the legs of the already dead victim as being torturous, it is clear that a dead body does not feel pain. Even the prosecutor conceded this elementary proposition, when, in speaking to the jury of the shot between the victim's legs, he stated, "Sure, he didn' feel it." (Tr. 274)

described the "extent of the harm or torture" as follows: "Defendant fired a shot into victim's genitals as described in the record." Report of the trial judge, January 12, 1979, at 4. In light of the trial judge's exclusive reliance on this post-mortem evidence in describing the conduct that could conceivably be construed as constituting torture and the prosecutor's emphasis of this aspect of the crime, it is reasonable to conclude that the jury was similarly swayed by this inappropriate evidence in returning a finding of Section (b)(7).

The Supreme Court of Georgia attempted to side-step this issue by arguing that, in its view, other evidence of the crime, which the trial judge did not specify as tortuous can be relied upon to affirm the finding of torture. This argument is without merit.

As this Court stated in its initial review of the present Georgia death penalty scheme:

> Where the sentencing authority is required to specify factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

If, as is likely the case, the jury found the post-mortem shot to be the basis of the finding of torture, then the Georgia Supreme Court denied the meaningful appellate review spoken of in Gregg by disregarding the actual grounds for the jury's decision, and affirming the finding on another basis. Furthermore, as this Court observed in Cole v. Arkansas, 333 U.S. 196, 202 (1948):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law--safeguards essential to liberty in a government dedicated to justice under law.

The prosecutor surely tried this case on the theory that the post-mortem shot evidenced torture; this theory was accepted by the trial judge, and one can only assume, by the jury, as well. Even in its brief submitted to this Court in opposition to Petitioner's initial certiorari petition, the State of Georgia adhered to its position that the post-mortem shot constituted torture.[6/] Brief for Respondent in Opposition to Petition for Writ of Certiorari, Baker v. Georgia, at 12. While in the wake of Godfrey, the Georgia Supreme Court has now conceded that post-mortem evidence cannot supply the basis for a finding of torture, Cole v. Arkansas, supra, establishes that the Georgia Supreme Court is not free to affirm the finding of torture on the basis of other evidence that was not the grounds for the jury's finding.

Moreover, the Georgia Supreme Court cannot simply assume that the jury, unlike the trial judge, considered only pre-mortem acts as evidence of torture. By affirming Petitioner's death sentence on the basis of torture, the Georgia Court has acted in contravention of the unbroken string of cases in which the United States Supreme Court has insisted that no criminal sentence may be upheld on the basis of appellate speculation that a jury that is faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. Stromberg v. California, 280 U.S. 359, 368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S. 136 n. 45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street

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[6/] It is impossible to know with certainty whether the Georgia Supreme Court's initial opinion even affirmed the existence of torture in this case, let alone what evidence it relied upon. The Court acknowledged Petitioner's argument that no toture occurred, but it relegated the answer to this argument to its "sentence review". The relevant portion of its sentence review misstates both jury findings of the Sections (b)(2) and (b)(7) aggravating circumstances and then concludes that "the evidence supports the statutory circumstances." Since its recitation of Section (b)(7) was in the disjunctive, it is unclear whether the court was affirming the finding of this circumstance on the basis of the existence of torture, depravity of mind, or perhaps even aggravated battery, which had not been found by the jury.

v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980). This due process right applies a fortiori in this case because of greater "need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Accordingly, the affirmance of Petitioner's death sentence in the face of the jury's inappropriate reliance on post-mortem events as evidence of torture, violates both the Eighth and Fourteenth Amendments.

VI.

THE COURT COMMITTED PREJUDICIAL ERROR IN THAT IT MADE IMPROPER STATEMENTS TO THE JURY DURING THE TRIAL, THUS VIOLATING PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When the State rested its case, the court asked defense counsel to proceed with evidence. When the defense rested without presenting any evidence, the court expressed surprise:

> THE COURT: The State has rested; you may proceed for the defendant, Mr. Pelham.
>
> MR. PELHAM: I would waive opening and reserve the right to conclude.
>
> THE COURT: Defendant has no evidence?
>
> MR. PELHAM: I'm sorry, we rest at this point. We offer no evidence.
>
> THE COURT: Evidence is closed. Defendant has the opening and concluding argument and you waive the opening? (Tr. 180) (Emphasis added)

The defense has no obligation to present any evidence. It is the State that must prove guilt beyond a reasonable doubt. It is therefore, prejudicial error for the court to imply otherwise or draw attention to the failure to present evidence.

Additionally, after the court excused the jury to hear the defense motion to exclude Dr. Dove's opinion testimony (which the court sustained, but the prosecutor and witness ignored), prejudicial error was again committed. When the jury returned, the court implied (perhaps inadvertently) that they might not hear all the evidence against the defendant:

> I just want to explain the procedure, when the court asks you to step out to--so the court can entertain a motion, it's not to hide anything from you in the trial of the case. Sometimes a determination has to be made as to whether certain testimony or articles or things would be admissible, whether it would be legal for you to hear it. So that is the only reason that you are excluded from the testimony from time to time. (Tr. 95) (Emphasis added)

In Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976), it was held that a trial court's expression of opinion concerning certain testimony elicited at trial could not be deemed harmless error:

> Our Courts have consistently ruled that an expression of opinion by the court with regard to what had or had not been proved cannot be deemed harmless. (Citations omitted) Id. at 228 S.E.2d 373. (Emphasis added)

The Crawford court quoted the Honorable Benjamin H. Hill, the first Chief Judge of the Georgia Court of Appeals:

> The purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a defendant in his weakness, as well as in his strength, and to preserve inviolate the priceless right of trial by jury. The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the judge even with bare feet and uncovered head. The judge should sit on the bench the calm and impartial incarnation of law, as silent as the Sphinx on contested questions of fact. Taylor v. State, 2 Ga. App. 723, 729, 59 S.E. 12, 15 (Emphasis added)

The prohibition against comments concerning a defendant's failure to testify applies equally to the court as well as to the prosecutor. Griffin v. California, 380 U.S. 609 (1965); McCann v. State, 108 Ga. App. 316(1), 132 S.E.2d 813, 814. In the instant case, the error is particularly prejudicial because the testimony sought to be excluded was presented anyway in violation of the court's prior order. (See P.19, infra.)

Petitioner's right to have his guilt or innocence determined by an impartial jury was thereby infringed by the trial court's improper and prejudicial statements and Petitioner was denied his rights under the Fifth, Eighth and Fourteenth Amendments.

VII.

PETITIONER'S DEATH SENTENCE SHOULD BE VACATED IN LIGHT OF STEPHENS v. ZANT, 631 F.2d 397 (5th Cir. 1980), rehearing denied and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (October 5, 1981) (No. 81-89).

In the instant case, the question remains whether the death penalty can constitutionally be imposed when the sentencer indiscriminately invokes two grounds for its imposition and one is invalid.[7/] The substantiality of the question is addressed by the differing views expressed by Justices in passing on post-Godfrey certiorari petitions on November 17, 1980. 49 U.S.L.W. 3370-71. The logic of the position of Justice Stewart, one of those who wrote on that occasion, seems to us unassailable. He pointed out that the sentencer "has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case." Westbrook v. Balkcom, 49 U.S.L.W. 3371, cert. denied, (No. 79-6615, Stewart, J. dissenting). Only the sentencer, then can know how its discretion would be affected by the knoweldge that only one aggravating circumstance and not two were present. To disaffirm a discretionary decision in the circumstances suggested is to act on sheer speculation.

On review, an unexplained discretionary decision cannot rationally be sustained if one of the substantial considerations entering into it is held to be an impermissible consideration. The Fifth Circuit Court of Appeals recently reached that very conclusion in Stephens v. Zant, supra. In that instance, the trial judge permitted the jury to consider four statutory aggravating circumstances. Following trial, and before petitioner's case was reviewed by the Supreme Court of Georgia, that

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7/ Petitioner contends that both the Section (b)(2) aggravating circumstance and the Section (b)(7) aggravating circumstance was defective as a matter of law, and neither could support the death penalty.

Court declared one of the four aggravating circumstances to be unconstitutionally vague. The Georgia Supreme Court eliminated that circumstance from consideration of petitioner's appeal and still found that the evidence supported the jury's findings of the other statutory aggravating circumstances and that the sentence was not impaired. Stephens v. State, 237 Ga. at 261-262, 227 S.E.2d at 263. On appeal to the Fifth Circuit, Petitioner argued that the jury's consideration of the aggravating circumstance (later declared unconstitutional) "create[d] such potential for the intrusion of arbitrary influences into his sentences as to violate his constitutional rights and require his sentence to be vacated." Stephens v. Zant, supra at 405. The court addressed the question "whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." Stephens v. Zant, supra at 406.

The court then cited Furman v. Georgia, 408 U.S. 238 (1972) for the proposition that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner, concluding that "it is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance." Stephens, supra at 406. (Emphasis added) The court held that even if the jurors believed the other aggravating circumstances had been established, it is possible that they would not have recommended the death penalty but for the one aggravating circumstance that was later held to be unconstitutional. Thus, "the jury's discretion here was not sufficiently channeled (see Godfrey v. Georgia, 100 S.Ct. 1759 (1980)) and

that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" (Citations omitted) Stephens v. Zant, supra at 406.

In the instant case, if the court should determine that the jury improperly relied on either statutory aggravating circumstance submitted for their consideration, then, under the mandate of Stephens v. Zant, Petitioner's death sentence must be vacated. See also Bryson v. Alabama, 634 F.2d 862 (5th Cir. 1981) n. 6 authorizing remand for resentencing in light of Stephens v. Zant, supra). In Stephens, the aggravating circumstance was declared unconstitutional following trial and prior to review by the Georgia Supreme Court. In the instant case, the statute making armed robbery a capital offense, was held unconstitutional long before the trial of Danny Baker. (November 1978) Gregg v. State, supra, held the armed robbery death statutes to be unconstitutional in 1974.

Therefore, under the holding of Stephens v. Zant, supra, because the jury in the instant case considered an unconstitutional aggravating circumstance, Petitioner's death sentence cannot stand.

VIII.

THE INFLICTION OF THE DEATH PENALTY ON A PERSON WHO WAS NINETEEN YEARS OF AGE AT THE TIME THAT THE ALLEGED CRIME WAS COMMITTED, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner respectfully submits that it is unconstitutional to sentence a nineteen year old to death when he has no prior criminal record and where his first offense was a single homicidal act committed when his culpability was at least partially diminished owing to serious intoxication.

In Eddings v. Oklahoma, 50 U.S.L.W. 4161 (1982), this Court vacated a sentence of death because it "was imposed without 'the type of individualized consideration of mitigating factors... required by the Eighth and Fourteenth Amendments in capital cases.'" At 4161. Although Eddings, a youth of sixteen when the offense was committed, asked this Court to determine whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on a youthful offender, the majority opinion did not reach that issue. Instead, the case was reversed because the trial court failed to consider mitigating circumstances, other than Eddings age, in imposing the death sentence. In the instant case, Petitioner was nineteen years old at the time of the alleged offense and the evidence at the sentencing phase of his trial demonstrated that he had been a victim of violent child abuse. The words of Mr. Justice Powell, writing for the majority in Eddings, supra, are particularly relevant here:

> But when the defendant was sixteen years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * *
>
> But youth is more than a chronologic fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their

> earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. At 4164.

In the instant case, as in Eddings, there was testimony that Petitioner's mental and emotional development "were at a level several years below his chronological age". As Justice O'Connor wrote in her concurring opinion in Eddings, supra:

> Because sentences of death are 'qualitatively different' from prison sentences, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) opinion of Stewart, J.) this court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process, that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake. Surely, no less can be required when the defendant is a minor. At 4165.

Although no longer legally considered a minor at nineteen years of age, Petitioner would respectfully urge the Court to reconsider the question of youth, coupled with the mitigating factors herein demonstrating a cruel and turbulent family history, (see footnote 1, infra), and determine that in the instant case, imposition of the death penalty constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

IX.

DURING THE PUNISHMENT PHASE OF THE TRIAL, THE TRIAL COURT FAILED TO CHARGE THE JURY ON THE LAW OF MITIGATING CIRCUMSTANCES, AND FAILED TO CHARGE THAT MITIGATING CIRCUMSTANCES COULD ACT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND, THUS, REQUIRE A SENTENCE OF LIFE IMPRISONMENT RATHER THAN DEATH. THIS ERROR VIOLATED PETITIONER'S RIGHT TO A RELIABLE, NON-ARBITRARY SENTENCING PROCEEDING, PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The only reference to the law of mitigating circumstances contained in the trial court's pre-sentence charge to the jury is as follows:

> Now, members of the jury, you should consider all of the evidence submitted to you in both phases of this trial in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case. (Tr. 305)

Immediately upon the conclusion of the charge, the following colloquy took place between the prosecutor, the court and defense counsel when the prosecutor inquired:

> (Whereupon the jury was retired from the jury box.)
>
> MR. HUFF: If Your Honor please, I may have overlooked it, did you define mitigating circumstances to them? Was that in the charge?
>
> THE COURT: I don't know how you define--
>
> MR. PELHAM: There is no legal definition. I think it says anything you want to call them.
>
> THE COURT: I don't know how you define mitigating circumstances, Mr. Huff. It's a matter for the jury.
>
> MR. HUFF: Yes sir.
>
> (Recess) (Tr. 308) (Emphasis added)

The record in the instant case clearly demonstrates that the District Attorney, himself, believed that the Court did not adequately define mitigating circumstances, as such a definition was warranted by the evidence and authorized by Ga. Code §§27-2534.1(b) and (c).

Georgia law has held "that 'to meet the requirements of the Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances'". Hawes v. State, 240 Ga. 327, 334 (1977) quoting from Jurek v. Texas, 428 U.S. 153 (1976). In Hawes, supra, the Supreme Court of Georgia set aside the death sentence for the reason the Court "did not instruct the jury that they should consider mitigating circumstances in arriving at their decision on the appropriate penalty to be imposed." Id. at 334.[8/]

In Flemming v. State, 240 Ga. 142 (1977), the Supreme Court of Georgia explicitly recognized that Georgia's death penalty system requires that the jury consider mitigating circumstances relevant to the defendant. "First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance. (Ga. Code §27-2534.1(b)(1-10)), beyond a reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case." 240 Ga. at 147 (Emphasis added). In the instant case, the Court's charge concerning mitigating circumstances failed to convey the necessity for considering mitigating circumstances as defined in Flemming, supra. Moreover, the Court failed to instruct the jury as to the specific evidence to be considered in mitigation. Furthermore, there was a total failure to define the word mitigation, which, contrary to the trial court's assertion "I don't know how you define mitigating circumstances", is clearly capable of definition. It is inconceivable that a jury of twelve average people would completely understand what is required of them when they are told that they should consider "mitigating"

[8/] It is not necessary for a specific request to be made by counsel that the law or existence of mitigating circumstances be charged. Hawes v. State, supra. As well, the issue of failure to charge the law and existence of mitigating circumstances may be raised in habeas corpus in a death case whether objection is made in trial court or not. Stephens v. Hopper, 241 Ga. 596 (1978).

circumstances in deciding whether or not to sentence a defendant to death. Petitioner respectfully submits that in order for the jury to have considered factors in mitigation, it must be clearly informed of its task. The trial court court could have borrowed the following language from this Court which succinctly and clearly defines the Eighth Amendment's requirement of consideration of mitigating circumstances:

> [The Eighth Amendment] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the death penalty. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Furthermore, this Court has stated:

> A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. Jurek v. Texas, supra, 428 U.S. at 271.

Petitioner respectfully submits that the pre-sentence charge in this case, far from guiding the jury in its deliberations, mandated the return of the death sentence, and flagrantly violated the requirements of the Eighth Amendment to the United States Constitution.

CONCLUSION

Petitioner respectfully contends that serious questions are presented herein concerning the constitutionality of the imposition of the death penalty. His petition should, therefore, be granted.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By: Mark J. Kadish
MARK J. KADISH

By: Rosalyn S. Kadish
ROSALYN S. KADISH

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81 6657

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, DANIEL JOSEPH BAKER, who is now being held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the Superior Court of Butts County, Georgia, without prepayment costs and to proceed in forma pauperis pursuant to Rule 46 of this Court.

Petitioner's affidavit in support of this Motion is attached hereto. On May 27, 1980, and again in December, 1980, this Court granted a similar motion for leave to proceed in forma pauperis. In addition, a Motion to Proceed in Forma Pauperis was granted in the Superior Court of Butts County, State of Georgia, on April 13, 1981.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By: Mark J. Kadish
MARK J. KADISH

ATTORNEY FOR PETITIONER

Suite 700, The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

(404) 688-2000

CASE NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1981

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DANIEL JOSEPH BAKER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes___ No ✓

   (a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   (b) If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. ___ December 1977 $496 .

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? Yes___ No ✓

(a) If the asnwer is yes, describe each source of income and state the amount received from each during the last twelve months. _____.

3. Do you own any cash or checking or savings accounts? Yes___ No ✓

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No ✓

(a) If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Daniel Joseph Baker
DANIEL JOSEPH BAKER

State of Georgia
County of _____

Subscribed and sworn to before me
this 29 day of April, 1982.

Claire Requemore
Notary Public, Lamar Co., Ga.
My commission expires: My Commission Expires SEPT. 20, 1983